

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD L. TROWER
Claimant

VS.

ATCHISON CASTING CORPORATION
Respondent
Self-Insured

)
)
)
)
)
)
)

Docket No. 193,946

ORDER

Claimant appeals from a Preliminary Order entered by Administrative Law Judge James R. Ward on May 26, 1995.

ISSUES

The issue to be considered on appeal is whether the Administrative Law Judge has the authority to refuse to hold a preliminary hearing on the basis of the Benefit Review Conference Report and Notice of Intent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Without affording the parties the opportunity to present evidence at a preliminary hearing, the Administrative Law Judge entered an Order in this case, which read in pertinent part as follows:

"Based on the documentation attached to the Application for Preliminary Hearing, including the Benefit Review Conference Report and the Notice of Intent, there is no evidence upon which claimant could prevail at a preliminary hearing."

The Benefit Review Conference Report reflects claimant is requesting a change of physicians because the claimant wants the recommended surgery to be done at one time, rather than the two separate procedures as recommended by the treating physician. The record also reflects that no other physician has agreed or indicated a willingness to perform the procedure at one time. The medical records attached to the Notice of Intent include a report from Dr. Shriwise indicating a need for surgery is related to years of wear and tear on the knee.

From the Benefit Review Conference Report and the documents attached to the Notice of Intent, it appears quite likely claimant would not be able to prevail in a preliminary hearing. The benefit review conference and requirements for records to be attached to the Notice of Intent are procedures intended to facilitate exchange of information and possible

resolution by agreement of the parties. The procedures are not, however, intended to substitute for a preliminary hearing. K.S.A. 44-534a provides:

"If the issues cannot be resolved by the benefit review conference, the director shall assign the application to an administrative law judge who shall set the matter for preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing." (Emphasis added)

The Appeals Board finds that once the parties comply with the procedural requirements for requesting a hearing, the Administrative Law Judge does not have the discretion to refuse to hold a preliminary hearing, at which the parties must, at a minimum, be allowed to make a proffer of their evidence.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of the Administrative Law Judge should be and the same is hereby reversed. The claim is remanded to the Administrative Law Judge with directions to provide notice of and conduct the preliminary hearing requested.

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
John B. Rathmel, Overland Park, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director